

Subpart G—Provision and Handling of Information

§ 800.701 Obligation of parties to provide information.

(a) Parties to a transaction which is notified under subpart D shall provide information to the Staff Chairman of the Committee that will enable the Committee to conduct a full review and/or investigation of the proposed transaction, and shall promptly advise the Staff Chairman of any changes in plans or information pursuant to § 800.402(h). See, generally, 50 U.S.C. app. 2155(a) for authorities available to the Committee for obtaining information.

(b) Documentary materials or information required or requested to be submitted under this part shall be submitted in English. Supplementary materials, such as annual reports, written in a foreign language, shall be submitted in certified English translation, at the request of the Committee.

§ 800.702 Confidentiality.

(a) Section 721(c) provides that any information or documentary material filed with the Committee pursuant to these regulations shall be exempt from disclosure under section 552 of title 5, United States Code, and no such information or documentary material may be made public, except as may be relevant to any administrative or judicial action or proceeding. Nothing in section 721 shall be construed to prevent disclosure to either House of Congress or to any duly authorized committee or subcommittee of the Congress.

(b) The provisions of 50 U.S.C. app. 2155(e) relating to fines and imprisonment shall apply in respect of disclosure of information or documentary material filed with the Committee under these regulations.

[56 FR 58780, Nov. 21, 1991, as amended at 59 FR 27180, May 25, 1994]

APPENDIX A TO PART 800—PREAMBLE TO REGULATIONS ON MERGERS, ACQUISITIONS, AND TAKEOVERS BY FOREIGN PERSONS (PUBLISHED NOVEMBER 21, 1991)

NOTE: For the convenience of the reader, this appendix contains the text of the pre-

amble to the final regulations on mergers, acquisitions and takeovers by foreign persons beginning at the heading "Discussion of Final Rule" and ending before "List of Subjects in 31 CFR Part 800" (56 FR 58780; November 21, 1991). Certain sections of the regulations were renumbered in a final rule published on May 25, 1994, and those number changes are reflected in the "Section-by-Section Discussion of Changes" in this appendix. (See appendix B of this part for the preamble of the May 25, 1994, final rule.)

DISCUSSION OF FINAL RULE

I. Introduction

On July 14, 1989, the Department of the Treasury published proposed Regulations Pertaining to Mergers, Acquisitions and Takeovers by Foreign Persons. The purpose of the proposed regulations was to implement section 721 (hereinafter referred to as "section 721") of title VII of the Defense Production Act of 1950, as added section 5021 of the Omnibus Trade and Competitiveness Act of 1988 (Pub. L. 100-418), relating to mergers, acquisitions, and takeovers of U.S. persons by or with foreign persons. Section 721, which was subject to the sunset provision of the DPA, lapsed on October 20, 1990, and was reinstated and made permanent law by Public Law 102-99 (signed August 17, 1991).

The period for receiving comments on the proposed regulations closed on September 14, 1989; during that time, over seventy parties—including private and public, as well as domestic and foreign entities—filed in total some 500 pages of comments. The changes that have been incorporated into the final version of the regulations reflect both suggestions made in those comments and the experience of the Committee on Foreign Investment in the United States ("the Committee") in reviewing transactions notified under section 721 since the proposed regulations were published. These changes are of a substantive nature as well as of a technical nature; examples of the latter include clarifications of terms and changes in format. The substantive issues will be discussed in the next section; the most significant technical changes will be discussed in the third section of this preamble.

II. General Discussion: Major Substantive Issues Raised by the Public Comments

Despite the wide range of interests represented by the public comments and the large volume of those comments, the comments generally focused on nine major issues: the meaning of "national security"; the scope of section 721's coverage, focusing largely on the size of a transaction or date of completion; the definition of "foreign control"; the application of section 721 to foreign lenders; the desirability of fast track

treatment for certain types of transactions; the treatment of transactions involving hostile parties; the provisions of the regulations providing remedies for material omissions or errors; Committee procedures; and the possibility of a "sunset" on the President's power to act under section 721 on non-notified transactions. The suggested resolutions of these issues varied significantly in many cases. Each of these major issues, including some of the resolutions proposed by the public, will be discussed generally in this section of the preamble. A more detailed analysis, tied to the actual wording of the final regulations, follows in the next section. The final section reiterates certain information on international obligations of the United States that was set forth in the preamble to the proposed regulations.

NATIONAL SECURITY

The desire for a definition of "national security," or for expanded guidance as to the meaning of that term, was a major theme of the public comments. Commenters had a wide range of recommendations on this point. Their suggestions, as well as the Committee's view of them, will be discussed generally in the following paragraphs.

Some commenters suggested that changes be made in the regulations to incorporate either positive lists of products and services considered essential to the national security, or negative lists of areas that are not so considered. Other commenters suggested that the regulations incorporate a multi-factor test, based on a list of products and services the significance of which to the national security would depend on a number of other factors, such as the dollar value of the transaction, or the availability of the product or service from other U.S. suppliers. The Committee rejected these proposals, because they could improperly curtail the President's broad authority to protect the national security, and, at the same time, not result in guidance sufficiently detailed to be helpful to parties.

A third approach recommended in the public comments was to offer guidance as to the factors that are considered in a national security analysis. Such guidance would not have the legal effect of exemptions or lists, but would be intended to give the Committee's general views as to when filing might be considered appropriate. The Committee has adopted a limited form of this latter approach; however, since it believes such guidance is more appropriate to the preamble than the regulations themselves, the guidance is set forth below.

As is made clear in the principal legislative history (H.R. Report No. 576, 100th Cong., 2d Sess. 925-928, hereinafter "Conference Report"), the focus of section 721 is on transactions that could threaten to impair the national security. Although neither

the statute nor the Conference Report defines national security, the conferees explain that it is to be interpreted broadly and without limitation to particular industries. Conference Report at 926-927. In line with both the statute and the Conference Report, the final regulations do not define "national security." Ultimately, under section 721 and the Constitution the judgment as to whether a transaction threatens national security rests within the President's discretion.

Generally speaking, transactions that involve products, services, and technologies that are important to U.S. national defense requirements will usually be deemed significant with respect to the national security. It is the Committee's view that notice, while voluntary, would clearly be appropriate when, for example, a company is being acquired that provides products or key technologies essential to U.S. defense requirements. On the other hand, the Committee does not intend to suggest that notice should be submitted in cases where the entire output of a company to be acquired consists of products and/or services that clearly have no particular relationship to national security.

The regulations contemplate that persons considering transactions will exercise their own judgment and discretion in determining whether to give notice to the Committee with respect to a particular transaction. Nonetheless, persons wishing to seek general guidance are invited to contact the office of the Staff Chairman, at the address and telephone number indicated above.

In addition to proposing changes to the regulations themselves, a number of commenters suggested that the Committee publish guidance outside the regulations, in order to enhance public understanding of "national security." For example, some suggested that the Committee issue binding advisory opinions with respect to transactions on the strength of something less than full notice. The Committee rejected this suggestion on the grounds that it would be impossible for the Committee to fulfill its obligation to make a thorough national security analysis based on an abbreviated or informal filing, and the Committee in such cases would generally have to advise the parties to submit a formal filing, resulting in lost time on both sides.

Several parties asked the Committee to consider publishing in summary form a digest of all the reviews and investigations the Committee had undertaken, including information on how the Committee disposed of each transaction. This approach was determined to have two essential shortcomings. First, national security considerations preclude revealing why the Committee or the President reached a particular view. Without that information, parties could inappropriately conclude that an outcome in a previous case would be relevant to the outcome of

their own case where both appeared to involve similar facts and circumstances. The public would have no way of assessing which factors were most important to the Committee's final determination, or whether other factors, not mentioned in the summary, played an important role in the outcome. Second, the Committee is statutorily required to maintain confidentiality with respect to section 721 filings. Publication of even "cleansed" summaries could sacrifice the confidentiality of a filing and potentially create concerns by parties over inadvertent publication of business confidential information, while affording relatively little useful information to readers.

SCOPE OF COVERAGE

With respect to the scope of coverage of section 721, a number of parties suggested various "bright line" tests to eliminate certain transactions from coverage, primarily based on their size, but also on other criteria. For example, it was frequently suggested that transactions under a certain dollar threshold be exempted, on the theory that very small acquisitions could not possibly have a meaningful impact on the national security. Other parties suggested a test based on the market share represented by a particular transaction. Because the Committee's experience in reviewing notified transactions has demonstrated that there is no predictable relationship between the size or dollar value of a transaction and its significance to the national security, it decided that it would be inappropriate to adopt bright line tests based on such criteria.

Many commenters argued that there should be an exemption for transactions completed after the date on which section 721 became effective (August 23, 1988), but which were not notified to the Committee. The Committee has not adopted this suggestion, which, in the Committee's view, would seriously undermine the effectiveness of the statute.

The regulations establish a voluntary, rather than a mandatory, system of notice. Nevertheless, the Committee wanted to ensure that the President would be able to act with respect to any transaction that might threaten the national security. For this reason, agency notice was permitted for transactions that were not notified by parties to the transaction. Also, as an incentive for parties to give notice of transactions that might raise concerns, the possibility of Presidential action exists for completed transactions that have not been notified to the Committee.

This approach is justified by the language of section 721. The first sentence of paragraph (a) of section 721 provides:

The President or his designee may make an investigation to determine the effects on

national security of mergers, acquisitions, and takeovers *proposed or pending on or after the date of enactment of this section* by or with foreign persons which could result in foreign control of persons engaged in interstate commerce in the United States. (Emphasis provided).

The plain meaning of this sentence is that one of two criteria must be present to bring a transaction under section 721. A transaction must have been proposed on or after the date of enactment, or it must be (or have been) pending on or after the date of enactment to be subject to section 721. This language does not exclude completed transactions. Thus, a transaction proposed on or after the date of enactment—regardless of whether it is completed by the time of notice—is subject to section 721. Similarly, a transaction proposed before the effective date but still pending on or after that date would also be subject to section 721, again, regardless of whether it was completed at the time of notice.

Some commenters have read the second sentence of section 721(a) as suggesting that Congress did not intend to capture completed transactions. That sentence reads: "If it is determined that an investigation should be undertaken, it shall commence no later than 30 days after receipt by the President or the President's designee of written notice of the proposed or pending merger, acquisition, or takeover as prescribed by regulations promulgated pursuant to this section." (Emphasis added.) Some commenters have argued that this sentence suggests that transactions must also be proposed or pending *as of the time of notice*, thereby precluding notice of completed transactions.

However, it would be inconsistent with the national security purposes of the statute to infer that Congress intended to establish a large loophole by which parties could avoid a review under section 721 simply by not giving notice of a transaction. It is much more reasonable to view this language as reflecting the usual case, *i.e.*, that parties give notice of transactions while they are still proposed or pending, but not precluding notice of completed transactions as well. Once a transaction is subject to section 721, all of the powers and remedies granted the President under that section apply to the transaction, including, but not limited to, divestment relief. Section 721(c) provides that the President may "take any action * * * to suspend or prohibit any acquisition * * * proposed or pending on or after the date of enactment of this section * * * so that [foreign] control will not threaten to impair the national security." Section 721(c) further provides that the President "may direct the Attorney General to seek appropriate relief, including divestment relief * * * in order to implement and enforce this section." Again,

the relief available under the statute for any transaction pending on or after the date of enactment is broad, and nothing in the statute narrows the availability of any Presidential remedies.

FOREIGN CONTROL

The proposed regulations defined control functionally, in terms of the ability of the acquirer to make certain important decisions about the acquired company, such as whether to dissolve the entity, or to relocate or close production or research and development facilities. A number of commenters complained that this standard is too nebulous, and advocated the adoption of a bright line control test based on a particular percentage of stock ownership and/or the composition of the board of directors. Given the national security purposes underlying section 721, the Committee believes it would be inappropriate to adopt such bright line tests, which would make it relatively easy to structure transactions to circumvent the statute. However, the Committee did make certain minor adjustments in the control standard to remove unnecessary ambiguity. These changes are discussed below in the section-by-section analysis at §§800.204 and 800.211.

FOREIGN LENDERS

At the time the proposed regulations were drafted, the Committee had almost no information on how section 721 would affect transactions involving foreign lenders. The proposed regulations were therefore deliberately vague as to whether foreign lending transactions would be covered and, if so, the appropriate time for giving notice—*i.e.*, at the time a loan was made, or at the time of default. Since the publication of the proposed regulations in July 1989, the Committee has had more experience in reviewing lending transactions, in addition to the benefit of the public comments. Although the comments were not unanimous on this point, most commenters urged that lending transactions not be covered at the time a loan is made, in view of the unlikelihood that the loan itself will culminate in the foreign lender's acquiring control.

However, these commenters were nevertheless concerned that foreign lenders be given some assurance that the value of their security interest would not be affected by CFIUS action. The Committee concluded that the acquisition of a security interest, without control, is not covered by section 721. Thus, if a lending transaction included, for example, contractual or other arrangements that conferred control, the transaction would be subject to section 721. However, the Committee would not view standard provisions of loan contracts (*e.g.*, ordinary covenants of the borrower pertaining to liens, or a lender's

right of veto over mergers or the sale of property), in and of themselves, to confer control over the borrower. (See the discussions below under §§800.302 and 800.303 for further elaboration of the treatment of foreign lending transactions.)

INTERNAL FAST TRACK MECHANISM

A number of commenters urged the adoption of a fast track procedure for reviewing notices under section 721 that clearly do not raise serious national security concerns. Because of the very short time frame for reviews that already exists (as provided in the statute), and in order not to encourage parties to give notice of marginal transactions, the Committee decided not to create a formal fast track in the regulations. The Committee Staff Chairman is available to discuss proposed transactions with parties contemplating notice.

HOSTILE TAKEOVERS

Fast track treatment of notified transactions involving hostile parties was also requested in several of the comments, on the grounds that the delay caused by Committee review under section 721 can unfairly give a target company time to thwart an unsolicited bid. Although this has not been a significant problem to date, the Committee will not tolerate attempts to delay or obstruct the review process; the final regulations make clear that the parties that did not file the notice must file information requested by the Staff Chairman within seven days of that request. (See the discussion in the section-by-section analysis at 800.402.) If necessary, the Committee can resort to its subpoena authority in the Defense Production Act to enforce compliance with section 721.

REMEDIES FOR MATERIAL OMISSIONS AND ERRORS

Many of the commenters contended that the absence of any definition for "material" in §§800.601 (pertaining to material omissions) and 800.701 (pertaining to material changes) creates uncertainty about the finality of any decision by the President not to investigate or take other action with respect to a notified transaction. To lessen this uncertainty, some commenters suggested that the final regulations incorporate a limit on the President's authority to reopen consideration of a transaction previously considered under section 721 due to a material omission. Others suggested that there be a time limit on the Committee's ability to reject a notice on the grounds of material change. The Committee did not adopt either of these time limitations. The former could potentially reward parties who conceal information or fail to take adequate care to bring all material facts about a transaction to light in a notice.

The latter limitation could prevent the Committee from declining to complete its review of a transaction that changes radically very late in the 30-day review period, and could force an investigation even in a case where it would not otherwise be necessary.

The Committee also did not accept the suggestion made by a few commenters that a transaction be reopened only when the Committee can show that the parties deliberately withheld material information. If information is material to the Committee's or the President's deliberation, it is irrelevant to the issue of materiality whether the information was intentionally withheld. The Committee has accepted suggestions that greater guidance as to the meaning of "materiality" be given in the regulations. It is also important to note that parties may at any time during the course of a review under section 721 amend the notice to apprise the Committee of an omission in the original filing or of a change in the transaction since the time the filing was made, and that such an amendment will not necessarily affect the Committee's ability to complete its review of the transaction within the statutory time periods. From the parties' perspective, it is clearly advantageous to bring material changes and omissions to light during the course of a review, rather than to risk discovery of such matters by the Committee at a subsequent time.

A material change that occurs during the course of review that is not brought to the Committee's attention will be subsequently viewed as an omission, and may cause the Committee to reopen its consideration of a case. The same would be true of a change that occurs after the President has announced his decision but was contemplated by the parties at the time the transaction was under review and not communicated to the Committee. However, recognizing that businesses often change in terms of function and structure, the Committee would not consider a material change that is both conceived and executed after the President's determination as a basis for reopening a case.

COMMITTEE PROCEDURES

Commenters made a number of suggestions regarding Committee procedures. In some cases, the Committee had already been following the recommended procedures, and the final rule makes that explicit. For example, in appropriate instances, the Committee has met with parties involved in particular transactions in order to obtain further clarification or elaboration of the materials presented in the initial filing.

It is worth noting that the Committee follows certain other procedures, not spelled out in the final regulations, that help ensure the fairness of the review process. For example, the Committee sometimes receives unsolicited communications from third parties

concerning certain transactions. In order to ensure fairness, the Committee generally requests the parties to comment on the substance of third party communications that the Committee believes may be relevant to its full understanding of the notified transaction. Similarly, the Staff Chairman handles all communications by the Committee with the parties, so as to avoid any confusion resulting from contacts with individual Committee members by the parties or third parties.

A number of the recommendations in the comments about Committee procedures would make the review process a highly formalistic, adversarial process. This outcome was considered undesirable by the Committee, and such recommendations were not accepted. For example, the Committee did not adopt the suggestion that the parties be required to exchange public versions of their submissions to the Committee, or that material be filed only under oath. The Committee believes that giving the parties an opportunity to comment, when appropriate, on the substance of statements made by each other, as well as by non-governmental third parties, adequately ensure the integrity of the review process.

SUNSET ON PRESIDENTIAL AUTHORITY UNDER SECTION 721

Another concern expressed in the public comments pertained to the fact that the statute places no time limits on the President's authority to take action with respect to non-notified transactions. Some commenters argued that the absence of a limit on the President's power to divest a completed transaction effectively converts section 721 into a screening mechanism, since most parties will file notices to eliminate the possibility of future divestment. Several commenters suggested adoption of a sunset.

The Committee acknowledges that parties may have to make difficult decisions about whether or not to file under section 721, particularly when time is a critical factor in closing a deal. However, in the Committee's view, it would be inappropriate for the regulations to limit the President's authority to protect the national security with respect to any given transaction after a particular time. Instead, the regulations contain a new provision that limits to three years the time during which an agency can give notice with respect to a completed transaction. After the three year period, only transactions that appear to raise national security concerns can be reviewed and investigated, pursuant to a request from the Chairman of the Committee, in consultation with other members of the Committee. (See below §800.401.)

Some commenters evidently fear that a transaction could be reviewed several years after it was completed. The Committee notes that divestment with respect to a completed

but non-notified transaction would be limited by the requirement in paragraph (d) of § 800.601 that it be based on facts, conditions, or circumstances existing at the time the transaction was concluded. Parties should also note the addition of a new limitation on reviewing completed transactions, which has been incorporated at § 800.601(d). Advice in writing by the Committee that a notified transaction is not subject to section 721, *e.g.*, because the transaction would not result in foreign control of a U.S. business, is final and binding with respect to the transaction, as long as the information on which that determination is based is accurate with respect to the transaction. However, subsequent changes in the material facts pertaining to control, *e.g.*, a proposal by the foreign party to acquire additional stock, may result in a situation where notice to the Committee could be appropriate.

INTERNATIONAL OBLIGATIONS

In discharging its responsibilities under section 721, the Committee takes a case-by-case approach. The Conference Report states that section 721 is not intended to abrogate existing obligations of the United States under treaties, including Treaties of Friendship, Commerce and Navigation. Conference Report at 927. Those treaties contain national treatment provisions under which the United States is obligated to extend foreign parties treatment no less favorable than that accorded domestic parties, but is permitted to institute measures to protect U.S. national security. The Committee intends to implement section 721 and the regulations in a manner fully consistent with the international obligations of the United States.

III. Section-by-Section Discussion of Changes

The Definitions section, subpart B, has been alphabetized.

Section 800.201. In subsection (a), the definition of acquisition has been expanded to include specifically the acquisition of a person by a proxy contest undertaken for the purpose of obtaining control. In the preamble to the proposed regulations, the Committee requested public comments on the desirability of covering proxy contests under the regulations. The comments were inconclusive on this point. The Committee decided to cover specifically proxy contests undertaken for the purpose of obtaining control, such as a contest to change the board of directors, because such a contest represents a takeover attempt. Parties may give notice at or just prior to the time a proxy solicitation commences. However, contests undertaken for any purpose other than to obtain control would not be covered by the regulations.

In subsection (b), qualifying language has been added to the provision concerning the acquisition of assets where, in addition to

the asset acquisition, the acquirer will make substantial use of the seller's technology. The qualifier "excluding technical information generally accompanying the sale of equipment" is intended to convey that an acquisition of assets is not covered by section 721 unless the technology acquired by the foreign person is separate and apart from that inherent in, or typically accompanying the asset, such as instruction manuals and operating procedures that would routinely accompany equipment.

Section 800.204. The definition of control in the proposed regulations included the ability to "formulate" matters or decisions affecting an entity. A number of public commenters noted that the ability to "formulate" in this sense is not a meaningful index of control, since technically any shareholder has this right. To alleviate any uncertainty on this point, "formulate" has been dropped from the definition.

The definition of control has also been modified with the addition of subsection (b) to clarify that a U.S. person will not automatically be deemed to be foreign-controlled where a number of unrelated foreign parties hold an interest in that person. This point would apply even when the foreign parties taken as a whole hold the majority of stock in a U.S. company. The Committee would have to determine in such a case, as it would in any notified transaction, whether any single foreign party, acting on its own or in concert with another party (*e.g.*, through contractual arrangements), could control the U.S. person.

Section 800.213. A minor change to the wording of the definition of *foreign person* has been made to emphasize that there must be the present potential for control by a foreign interest, rather than a mere remote possibility, for an entity to be considered a foreign person under section 721. Whereas the regulation previously read "an entity over which control is *or could be exercised* by a foreign interest," the underlined phrase has been replaced by "exercised or exercisable" to alleviate vagueness or remoteness in the standard. Thus, only the present potential for control (regardless of whether the foreign interest actually exercises it) matters for purposes of this section.

Section 800.216. The proposed regulations left unresolved the issue of who are the parties to an acquisition in the case of a proxy solicitation. In light of the Committee's decision to cover proxy solicitations undertaken for the purpose of obtaining control just prior to and at the time the solicitation is made, the final regulations make both the persons soliciting proxies as well as the person who issued the voting securities parties to the acquisition.

Section 800.219. To make this section consistent with the modified definition of control, the word *formulation* has been deleted

from the definition of “solely for the purpose of investment.” (See §800.204 above.) With respect to §800.302(d) (which should be consulted), a party that has no intention of determining or directing the basic business decisions of the issuer, and who does not possess or develop any purpose other than investment, or take any action inconsistent with that purpose, would be deemed to hold securities solely for the purpose of investment.

Section 800.222. This section defines U.S. person as any entity “but only to the extent of its business activities in interstate commerce in the United States, irrespective of the nationality of the individuals or entities which control it.” To underscore the significance of that qualifier to the definition, a third example has been added to this section. The example describes the acquisition by a foreign person of a foreign subsidiary of a U.S. corporation. In the facts presented by the example, the foreign subsidiary has no fixed place of business in the United States, but merely exports goods to the U.S. parent and to unaffiliated companies in the United States. The acquisition of such an entity by a foreign person would not constitute the acquisition of a U.S. person under section 721 because the mere export of goods to the United States by a foreign subsidiary with no fixed place of business in this country does not constitute “business activity in interstate commerce in the United States” for purposes of the section.

Section 800.301. A few points pertaining to joint venture transactions have been clarified in this section. First, a joint venture transaction is subject to section 721 only if an existing, identifiable business in the United States is contributed to the venture. A joint venture transaction in which the U.S. contribution is a company founded for the purposes of the transaction would not be subject to section 721. Moreover, even where an identifiable business has been contributed to the venture, the transaction is not subject to section 721 unless the foreign party would control the venture. Therefore, joint venture transactions in which control is equally shared by the U.S. partner and the foreign partner, *i.e.*, where each party has a veto power over all the decisions of the joint venture, would not be subject to section 721. It is important to note, however, that this rule does not apply to other forms of business organization, such as when a foreign person acquires 50 percent of the stock of an existing U.S. company. In such cases, the Committee may, depending on the other facts surrounding the transaction, conclude that the stock acquisition confers control on the foreign person.

Section 800.302. Subsection (i) has been added to §800.302 as a corollary to section 301(b)(1), which provides that proposed or completed acquisitions by or with foreign

persons which could or do result in foreign control of a U.S. person would be subject to section 721. Subsection (i) of §800.302 provides that an acquisition (1) that does not involve the acquisition of control of (2) a person engaged in interstate commerce in the United States (*i.e.*, a U.S. person) would not be subject to section 721. Two examples are provided to illustrate the two components of this provision. First, with respect to the acquisition of control, when a foreign person acquires an interest, such as stock, in a U.S. person, but that interest is insufficient to confer control, the acquisition is not subject to section 721. The Committee's options for handling a notice of such a transaction are set out in §800.403 of the regulations.

Second, with respect to the component pertaining to being engaged in interstate commerce in the United States, Example 2 is intended to illustrate that the acquisition of a business that is essentially a non-operational shell—*i.e.*, having no employees, plants, equipment, or subsidiaries in the United States—would not satisfy this component and would therefore not be an acquisition subject to section 721.

Section 800.303. This section has been added to the regulations to clarify the Committee's treatment of lending transactions. As explained under §800.302 above, the acquisition of a security interest by a foreign lender in a lending transaction does not, without control, subject a transaction to section 721. Section 800.303 provides that the Committee will not accept notices of such transactions. However, the Committee will accept notice of such transactions where, because of actual or imminent default or other condition, the foreign lender is likely to obtain control of the U.S. person. In general, the Committee will accept the parties' view of the imminence of default, recognizing that in some cases waiting too long before filing notice could affect the lender's recourse to certain remedies, or the willingness of the borrower to cooperate fully in the preparation of a filing.

Some commenters argued that if the Committee does not accept notices of lending transactions until actual or imminent default, the lender will never have adequate assurance of the value of its security interest, which may eventually discourage foreign lenders from entering into financing transactions that may be subject to section 721. Some argued that the acquisition of stock or assets as a result of a default should be exempt from section 721, because it is essentially similar to an acquisition pursuant to an insurance contract made in the ordinary course of business, which is exempt under §800.302(g). The Committee does not find it appropriate to exempt the acquisition of a U.S. person that results from a borrower's default. However, to help alleviate the lenders' concerns in such circumstances, the

Committee will take into account steps the lender takes to transfer day-to-day control over the U.S. person to U.S. nationals, pending final sale of the U.S. person. For example, in appropriate cases, the Committee could determine that the lender does not control a company acquired through default when it appoints a trustee to run the company and commits to sell it within a specified reasonable period of time.

Section 800.303 also contains a special provision—subsection (b)—for foreign banks participating in loan syndications. In view of the limitations on control of the borrower by any one bank that are often inherent in the structure of a syndicate of banks in a loan participation, the Committee will deem any foreign lender in a syndicate not to have control for purposes of section 721 where such lender needs the consent of the majority of the U.S. participants to take action, or does not have a lead role in the syndicate and is subject to a special provision limiting its influence, ownership or control over the borrower.

Section 800.401. This section contains a new provision with respect to non-notified transactions. No agency notice can be made with respect to such a transaction more than three years after the date it was concluded unless the Chairman of the Committee, in consultation with other members of the Committee, requests an investigation. This provision was added to assuage public concern that non-notified transactions are indefinitely subject to divestment by the President. The President's powers under section 721 are *not* affected by this provision.

Section 800.402. Until now, the Committee has been willing to accept notices of transactions from just one of the parties to a transaction, recognizing that in some cases one of the parties alone will be able to provide answers and materials responsive to the questions posed in §800.402. Although the Committee will continue to accept joint notices prepared by just one party to a transaction that give information with respect to all the parties, the final regulations require all the parties to sign such a filing, thereby indicating to the Committee that each party is satisfied that the information in the filing pertaining to it is accurate and complete.

With respect to filings submitted by a party independently of the other parties, several points are worth noting. First, a minor wording change has been made in paragraph (1) of subsection (b) of this section for purposes of clarity: "Such information" has been replaced by "the information set out in this section." Although the phrase in that paragraph, "to the extent known or reasonably available to it," remains unchanged from the proposed regulations, it merits discussion here in order to remove any uncertainty. When a party giving notice is unable to answer fully a question pertaining to the

other party, it is not excused by the words "to the extent known or reasonably available to it" from submitting a complete and accurate filing, as has evidently been assumed by some parties. The Committee expects that in such a case either the party giving notice will obtain the assistance of the other party or parties, or that the latter independently will make a filing to the Committee, supplying the relevant information.

In any case, the Committee will delay beginning the initial thirty-day review period until the filing is complete with respect to both parties. Subsection (b) makes clear that the Staff Chairman of the Committee, when necessary, will contact directly the party or parties that did not file the notice and request that information responsive to §800.402 be filed within seven days of receipt of the request.

A new provision has been added to subsection (c), requesting parties to submit a summary of the transaction. The Committee requests that the party(ies) that give notice be as clear and concise as possible. A readily understandable summary will expedite the Committee's work.

Paragraph (3) of subsection (c) has also been modified to lengthen the period of time from three to five years for which contracts involving classified information should be described in a filing. As for contracts with the Department of Defense or any other agency of the U.S. Government with national defense responsibilities (such as the Department of Energy or the Nuclear Regulatory Commission), which contracts do not involve classified information, parties should continue to provide information for the past three years only.

Section 800.403. This new section sets out the Committee's options for handling certain voluntary notices; most of these points have been addressed in the preceding discussion. The Committee will delay acceptance of a notice that does not comply with §800.402. It reserves the right to reject a voluntary notice at any time before action by the Committee or the President has been concluded, if there has been a material change in the notified transaction.

As provided in §800.403(a)(4), the Committee will also inform the party submitting a voluntary notice if it decides not to undertake a substantive review of a transaction because it has determined that the notified transaction is not subject to section 721. For example, where the Committee determines that a notified transaction will not result in foreign control, the Committee would inform the parties of the nature of its determination, (e.g., no foreign control) and advise them to consider filing at a later date should an acquisition of control be contemplated.

Section 800.404. A technical wording change has been made to this section (which was

numbered §800.403 under the proposed regulations). The words “has been accepted” in the first sentence of that section replace “is received” to underscore that the 30-day review period does not begin until the Chair has determined that the voluntary notice complies with the requirements of §800.402. Further technical changes were made to subsection (a) to reflect changes made in §800.401 concerning agency notice.

Section 800.501. Subsection (b) has been added to this section to make explicit a practice the Committee has been following since it began receiving notices under section 721, *i.e.*, inviting the parties to certain notified transactions to meet with the Committee. The Staff Chairman, at his discretion, may invite the parties to a meeting to clarify certain issues with respect to the filing; such a meeting may occur either during the 30-day review period or during the investigation. When the parties involved in investigations request a meeting with the Committee, the request is ordinarily granted.

Section 800.601. A number of commenters expressed concern that the finality of Committee or Presidential action under section 721 is called into question if there is a right to reopen consideration of a case on the basis of material omissions or material misstatements. This section has been expanded in an attempt to allay some of those concerns. Subsection (f) has been added to clarify the matters the Committee considers “material”: These are confined to information requested by §800.402 of the regulations; information requested by the Committee during the course of an initial review, an investigation, or the Presidential determination period; or information provided by the party(ies) *sua sponte*. However, the Committee will generally not find information to be “material” if it concerns purely commercial matters having no bearing on national security, such as the price of stock.

DRAFTING INFORMATION

The principal author of this document is the Office of the Assistant General Counsel (International Affairs). However, personnel from other offices at the Treasury Department and from other agencies that are members of the Committee participated extensively in its development.

[56 FR 58780, Nov. 21, 1991. Redesignated and amended at 59 FR 27180, May 25, 1994]

APPENDIX B TO PART 800—PREAMBLE TO REGULATIONS ON MERGERS, ACQUISITIONS, AND TAKEOVERS BY FOREIGN PERSONS (PUBLISHED MAY 25, 1994)

NOTE: For the convenience of the reader, this appendix contains the text of the preamble to the final rules amending the regulations on mergers, acquisitions, and take-

overs by foreign persons beginning at the heading “Discussion of the Final Rule” and ending before “List of Subjects in 31 CFR Part 800” (59 FR 27178, May 25, 1994).

DISCUSSION OF THE FINAL RULE

Section 837(a) of the Defense Authorization Act creates for the first time a mandatory investigation provision under Exon-Florio. There are three points worth noting about this provision. First, this provision is limited in application to certain types of acquisitions. Specifically, the acquirer in question must be a foreign government controlled entity, or an entity acting on behalf of a foreign government. Furthermore, the acquisition must be one which “could result in control of a person engaged in interstate commerce in the United States that could affect the national security of the United States” (emphasis added). Thus, even where the other specified criteria are met, this provision does not mandate an investigation for cases that could not “affect the national security of the United States.”

Second, for purposes of determining whether the acquisition results in foreign government control, CFIUS is applying the same functional test for control as provided in §800.204.

Third, in contrast to the criterion for Presidential action under Exon-Florio, *i.e.*, that the foreign party acquiring control might take action that “threatens to impair the national security,” the criterion for undertaking an investigation of transactions involving government controlled entities is that there could be an effect on the national security.

The term “foreign government” has been broadly defined for purposes of these regulations to include any government or body exercising governmental functions, and includes but is not limited to national as well as various regional and local levels of government. It is important to note that the definition is not limited to the particular levels of government that are specified in the regulation, and that other governmental bodies, including supra-national entities such as the European Union (including its component parts), are covered by this regulation.

For purposes of the mandatory investigation provision, the regulations define the term “engage in” as used in the phrase “seeks to engage in any merger, acquisition or takeover * * *” to mean “seeks to acquire control through.” The purpose of this regulation is to clarify that the mandatory investigation provision would not be triggered in cases where a foreign government controlled entity’s participation in an acquisition is

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solely for the purpose of investment, as defined in §800.217 of the regulations. The Committee believes that this reading is supported by the legislative history, and particularly floor statements made by members of Congress who sponsored this particular amendment. *See, e.g.,* Cong. Rec., Sept. 18, 1992, pages S 14050 through 14053 (comments of Senators Exon, Sarbanes and Riegle); and Cong. Rec. Oct. 3, 1992, page H 10986 (comments of Representative Collins). Subparagraph 800.402(c)(5)(iii) has been changed in the final regulations by the addition of the words “for example” to clarify that an agency or representative role are examples of

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ways in which a foreign person can act on behalf of a foreign government, but are not the only ways in which such a relationship could be conducted.

DRAFTING INFORMATION

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[59 FR 27180, May 25, 1994]